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Supreme Court of the United States

OCTOBER TERM, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR AND M. M. O'GARA, PETITIONERS,

vs.

LEOLA JACKSON

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITION FOR CERTIORARI FILED DECEMBER 29, 1952
CERTIORARI GRANTED MARCH 9, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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OLIVE B. BARROWS, RICHARD PIKAAR AND M. M. O'GARA, PETITIONERS,

vs.

LEOLA JACKSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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[fol. 1]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 574475

OLIVE B. BARROWS, EDGAR W. BARROWS, RICHARD PIKARR AND M. M. O'GARA, Plaintiffs,

vs.

LEOLA JACKSON, DOE ONE, DOE TWO AND DOE THREE, Defendants

SECOND AMENDED COMPLAINT—DAMAGES FOR BREACH OF CONTRACT—Filed February 13, 1951

Plaintiffs complain of defendants and for cause of action allege as follows:

I

That the defendants sued herein as "Does" are sued by said fictitious names for the reason that the plaintiffs do not at the present time know their true names; that when same are ascertained plaintiffs will ask leave of court to amend their complaint by inserting the true names for said fictitious names whenever they may appear.

II

That at the time of the breach of contract hereinafter alleged and complained of and at all other times hereinafter referred to plaintiffs Olive B. Barrows and Edgar W. Barrows were and now are the owners and occupants of the residential real property located in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 46, Tract 1462, as per map recorded in Book [fol. 2] 20, Page 17 of Maps in the office of the County Recorder of said County; that at the time of the breach of contract hereinafter alleged and complained of and at all other times herein referred to unless otherwise stated, plaintiff Richard Pikaar was and now is the owner and occupant of the residential real property located in the City of Los

Angeles, County of Los Angeles, State of California, described as Lot 5, Tract 1462, as per map recorded in Book 20, Page 17 of Maps in the office of the County Recorder of said County; that at the time of the breach of the contract hereinafter alleged and complained of and at all other times herein referred to plaintiff M. M. O'Gara was and now is the owner of the residential real property located in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 42, Tract 1462, as per map recorded in Book 20, Page 17 of Maps in the office of the County Recorder of said County.

III

That on or about the 21st day of October, 1944, Leola Jackson, was the owner of certain residential real property located in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 47, Tract 1462, as per map recorded in the office of the County Recorder in said County; that plaintiffs are informed and believe and upon such information and belief allege that the defendant Leola Jackson continued to be the owner of said real prop-
[fol. 3] erty until the 2nd day of February, 1950; that defendant Leola Jackson is a resident of the County of Los Angeles, State of California.

IV

That on or about the 21st day of October, 1944, each of the above named plaintiffs, except plaintiff Richard Pikaar, and the defendant Leola Jackson, in consideration of the mutual benefit to the said property owners and their respective properties, executed an "Agreement Imposing Restrictions", (hereinafter referred to as Agreement) respecting the said real properties owned by the respective signers; that on or about the 21st day of October, 1944, the ancestors in title of the above named plaintiff Richard Pikaar were the owners of said Lot 5, that said ancestors in title of the above named plaintiff Richard Pikaar executed said Agreement for said consideration; that said Agreement was caused to be recorded on the 8th day of May, 1945, in Book 21896 at page 373 of the official records of Los Angeles County, State of California.

V

That by the terms of said Agreement each of the signers promised and agreed in writing and bound himself, his heirs, executors, administrators, successors, and assigns, by a continuing covenant that no part of his said real property, described therein, should ever at any time be used or occupied by any person or persons not wholly of the white [fol. 4] or Caucasian race, and also agreed and promised in writing that this restriction should be incorporated in all papers and transfers of lots or parcels of land hereinabove referred to; provided, however, that said restrictions should not prevent the employment by the owners or tenants of said real property of domestic servants or other employees who are not wholly of the white or Caucasian race; provided, further, however, that such employees shall be permitted to occupy said real property only when actively engaged in such employment. That said Agreement was agreed to be a covenant running with the land. That each provision in said Agreement was for the benefit for all the lots therein described.

VI

That said Agreement further provided that if any of the said lots of real property hereinbefore described should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race, then in that event the covenantor who covenanted as to that lot, or his heirs, executors, administrators, successors, or assigns, would immediately become liable to those covenantors, their heirs, executors, administrators, successors, or assigns, whose lots were not so occupied for all damages which they may have suffered by reason of the breach *of* thereof.

[fol. 5]

VII

That said Agreement further provided that if any actions were brought for the breach or violation of said contract against those who caused, committed or permitted the breach thereof, the court should, in addition to the damages which may have been sustained by the plaintiffs, assess against the parties causing, committing, or permitting the breach thereof, a reasonable amount of attorney's fees and

court costs incurred in any proceedings brought because of the breach of said contract.

VIII

That all lots of real property referred to herein were described in said agreement and became restricted by said agreement.

IX

That the defendant Leola Jackson moved out of the house on said Lot 47 on or about the 3rd day of September, 1950; that plaintiffs are informed and believe and therefore allege that persons not of the Caucasian race moved into this said lot and began to use and occupy the same on or about the 4th day of September, 1950; are informed and believe and therefore allege that when defendants Leola Jackson moved out of the house on said Lot 47, she did so in order to permit persons known to her to be other than the Caucasian race to move into and occupy said house, and with the intention that persons not of the Caucasian race should move into [fol. 6] and occupy said house, all in the breach of said Agreement; that the plaintiffs are informed and believe and upon such information and belief allege that the defendant Loela Jackson, in violation of said Agreement, has permitted persons not wholly of the white or Caucasian race to occupy the said real property hereinabove described as Lot 47, Tract 1462, as per map recorded in Book 20, Page 17 of Maps in the office of the County Recorder of Los Angeles County, State of California, and that the occupancy of the said premises by said persons not wholly of the white or Caucasian race is for residence and not by servants or other employees of the owners or tenants of said real property.

X

That on or about the 2nd day of February, 1950, defendant Leola Jackson and one Dorothy May Grace executed a grant deed recorded in Book 32918, Page 213, of the records of the County Recorder of Los Angeles County, State of California; that said grant deed conveyed the said Lot 47 to Pearnell Smally and Florine Smally, his wife, as joint tenants; that defendant Leola Jackson failed to incorporate

in said deed the restriction contained in said Agreement against use and occupancy by persons not wholly of the white or Caucasian race; that defendant Leola Jackson failed to incorporate in said deed any restriction or any reference to said Agreement, all in breach of said Agreement.

[fol. 7]

XI

That as a direct and proximate result of the acts and conduct of defendant Leola Jackson, the property of plaintiffs Olive B. Barrows and Edgar W. Barrows has been materially depreciated in value and said property has become less attractive as a residential area all to the damage of plaintiffs Olive B. Barrows and Edgar W. Barrows in the sum of Three Thousand One Hundred Dollars ($3,100.00).

XII

That as a direct and proximate result of the acts and conduct of the defendant Leola Jackson the plaintiffs herein have been obliged to employ attorneys for the purpose of instituting and prosecuting this action and have employed John C. Miles and J. Wallace McKnight, attorneys at law, for such purpose, have incurred costs and expenses in connection therewith, the exact amount of which is not known to the plaintiffs at this time, and plaintiffs will ask leave of court to amend this complaint and add the same when said costs and expenses for attorney's fees, etc., becomes known.

For a Second, separate and distinct Cause of Action, Plaintiffs complain and allege as follows:

I

Repeat by reference thereto Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XII of the First Cause of Action [fol. 8] with like force and effect as if the same were herein set forth in full.

II

That when plaintiff Richard Pikaar purchased the lot owned by him, as alleged in Paragraph II hereof, said plaintiff did so with the knowledge of and reliance upon the terms of said Agreement, and in the knowledge and belief

that the premises described herein would at no time prior to the expiration of said Agreement in the year 2043, be used or occupied or permitted to be used or occupied as residence by any person or persons not wholly of the white or Caucasian race, except employees or servants of the occupants or owners of said premises.

III

That as a direct and proximate result of the acts and conduct of the defendant Leola Jackson, the property of plaintiff Richard Pikaar has been materially depreciated in value and said property has become less attractive as a residential area all to the damage of Richard Pikaar in the sum of Four Thousand Dollars ($4,000.00).

For a Third, separate and distinct Cause of Action Plaintiffs complain of Defendant as follows:

I

Repeats by reference thereto Paragraphs I, II, III, IV, V, VI, VII, VIII, IX; X and XII of the First Cause of Action above with like force and effect as if the same were herein [fol. 9-10] set forth in full.

II

As a direct and proximate result of the acts and conduct of defendant Leola Jackson, the property of plaintiff M. M. O'Gara has been materially depreciated in value and said property has become less attractive as a residential area all to the damage of the plaintiff M. M. O'Gara in the sum of Four Thousand Five Hundred Dollars ($4,500.00).

Wherefore, plaintiffs pray judgment against the defendant as follows:

(1) In the sum of $3,100.00 for damage to plaintiffs Olive B. Barrows and Edgar W. Barrows;

(2) In the additional sum of $4,000.00 for damage to plaintiff Richard Pikaar;

(3) In the additional sum of $4,500.00 for damage to plaintiff M. M. O'Gara;

(4) For reasonable attorney's fees;

(5) For costs of suit incurred herein;

(6) Such other and further relief as may be meet and proper in the premises.

John C. Miles and J. Wallace McKnight, By J. Wallace McKnight, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 11] In Superior Court of Los Angeles County

Separate Demurrer of Defendant Leola Jackson to Second Amended Complaint—Filed February 23, 1951

Comes now the Defendant Leola Jackson, and appearing for herself and herself alone, demurs to the Second Amended Complaint on file herein, and for grounds of demurrer states:

I

Said Second Amended Complaint does not state facts sufficient to constitute a cause of action.

II

Said Second Amended Complaint does not state facts sufficient to constitute a cause of action against this demurring defendant.

III

The First Cause of Action of said Second Amended Complaint does not state facts sufficient to constitute a cause of action against this demurring defendant.

IV

The Second Cause of Action of said Second Amended Complaint does not state facts sufficient to constitute a cause of action against this demurring defendant.

[fols. 12-13]

V

The Third Cause of Action of said second Amended Complaint does not state facts sufficient to constitute a cause of action against this demurring defendant.

VI

Said Second Amended Complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VII

Said Second Amended Complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant due process of law guaranteed by the Constitution of the United States.

Wherefore, this demurring defendant prays that her Demurrer to the Second Amended Complaint on file herein be sustained without leave to amend; that said Second Amended Complaint be dismissed; and that judgment be rendered in favor of this demurring defendant, together with her costs.

Sims & Wallbert. By Maurice H. Wallbert, Attorneys for Demurring Defendant.

[File endorsement omitted.]

[fol. 14] In Superior Court of Los Angeles County

Memorandum Opinion Re Ruling on Demurrer to Second Amended Complaint—March 26, 1951

By this action, plaintiffs seek damages from defendants for violation of race restriction covenants both in permitting the use of land subject to the covenant by persons not of the Caucasian race and also in failing to incorporate in the deed to such non-Caucasians a restriction against use and occupancy by non-Caucasians.

Defendant Leola Jackson's demurrer to the second amended complaint on the ground that it fails to state a cause of action thus squarely presents the question whether a California court may entertain such a suit.

All of the previously decided cases on this subject must be reappraised in the light of the recent decisions of the United States Supreme Court in *Shelley v. Kraemer*, 334 U. S. 1, and *Hurd v. Hodge*, 334 U. S. 24, both rendered in 1948.

In *Shelley v. Kraemer*, supra, the court announced the broad principle that State courts may not enforce such race restriction covenants, for by so lending the judicial arm of governmental authority to the effectuation of racial discrimination, a violation of the equal protection clause contained in the Fourteenth Amendment to the federal Constitution results. The type of judicial enforcement sought [fol. 15] in *Shelley v. Kraemer* was by way of injunction to restrain certain colored purchasers from taking possession of the premises covered by the covenant and to revest title in their grantor, and although the Supreme Court of Missouri had held such action to be proper, the Supreme Court of the United States reversed the Missouri decision for the reason stated.

Plaintiffs in the present action justify their efforts to seek judicial enforcement of race restriction covenants on the ground that the rule laid down in *Shelley v. Kraemer* should be limited to actions for injunctive relief and should not be applied to suits for damages against the white grantors who sold their property to non-Caucasians without including a race restriction covenant in the deeds of conveyance.

Altogether apart from the contention of plaintiffs that the United States Supreme Court did not intend by its ruling in *Shelley v. Kraemer* to foreclose a suit for damages for violation of a race restriction, it is extremely doubtful if plaintiffs' complaint states a good cause of action against the defendant vendors. For ever since the decisions in 1919 of *Title Guarantee & Trust Co. v. Garrott*, 42 Cal. App. 152, and *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, the law of this State without deviance has been that restrictions on the sale of property to non-Caucasians are invalid, and the aura of legality has been cast about race restric- [fol. 16] tions against *use* by the non-Caucasian. Therefore, it is difficult to see how a white vendor, whose *sale* of the property to a colored person is legal may be held legally responsible in damages for the subsequent *use* of the prop-

erty in contravention of the covenant, for the *use* of the realty is that of the purchaser not of the vendor.

Plaintiffs apparently recognize the weakness of their position in this regard, for they also rely on the failure of the defendant Jackson to include in her deed to the non-Caucasian purchaser a covenant restricting use of the premises to Caucasians. Under the pleadings, however, such omission on the part of Leola Jackson would appear to be immaterial, inasmuch as the complaint alleges the execution and *recordation* of a general race restriction agreement covering the property involved in this suit, creating a covenant running with the land as to all such property restricting its use to non-Caucasians. For a covenant so recorded, if valid, is binding upon all future purchasers who take their property subject to the constructive notice imparted by the recordation, even if the deed by which they acquired title contained no such recital. (*Wayt v. Patee*, 205 Cal. 46, 52-54; *Burkhardt v. Lofton*, 63 Cal. App. 2d 230, 237, 238.)

Plaintiffs' action for damages, therefore, if any such action is subject to judicial recognition, more properly lies against the non-Caucasians who actually are violating the [fol. 17] express provision of the continuing covenant by their use of the property. Plaintiffs' counsel concedes that his "Research has failed to disclose any case in California in which plaintiffs have sought remedy in damages (against the white vendors) rather than by injunction." In all probability, the reason why no such cases have been found is because, as heretofore illustrated, the white vendor is not violating the covenant by any *use* of the premises.

My basic reason for concluding, however, that plaintiffs' seconded amended complaint states no cause of action that may be judicially recognized rests on constitutional grounds. A reading of *Shelley v. Kraemer*, supra, and *Hurd v. Hodge*, supra, convinces me that the United States Supreme Court intended by its pronouncements therein to preclude State courts from giving judicial recognition to and enforcement of race restriction covenants contained in private agreements, whether such judicial enforcement be by way of injunction, declaratory relief, damages or any other type of action in which the remedy is predicated upon

a judicial holding, express or implied, that such a covenant is valid.

Thus although in *Shelley v. Kraemer*, the action was for injunction, the Supreme Court nowhere indicates that its rule of decision is limited to actions for an injunction to restrain the non-Caucasians from taking possession of and using the premises subject to the covenant. On the con- [fol. 18] trary, the language of the Court uniformly throughout the course of its opinion refers generally to the "validity of *court enforcement*" of private restrictive covenants, "that *judicial enforcement* of the restrictive agreements" violates the Fourteenth Amendment of the Federal Constitution, that the question involved was "Whether the equal protection clause of the Fourteenth Amendment inhibits *judicial enforcement* by state courts of restrictive covenants based on race or color," and again that "the constitutional issues presented by these cases . . . raise the question of the validity, not of the private agreements as such, but of the *judicial enforcement* of those agreements." (Emphasis added.)

The holding of the Supreme Court in *Shelley v. Kraemer*, supra, may be summarized as follows: "These are cases in which the purposes of the (race restriction) agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements" (334 U. S. at pp. 13, 14); judicial enforcement of such private agreements is action by the state, and "in granting judicial enforcement of the race restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand." (334 U. S. at p. 20.) By way of further emphasis, the Supreme Court declared that "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection [fol. 19] of the laws to other individuals." (334 U. S. at p. 22.)

Shelley v. Kraemer, therefore, in my mind, clearly establishes the major premise of the syllogism upon which my ruling on demurrer is predicated, that is: *Judicial enforcement of race restriction covenants by state courts is state action violative of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.*

property, his constitutional rights are satisfied.[2] He does not have the right of eminent domain in the property of others.

Cases involving the direct and proven effect of restricted membership in quasi-public service monopolistic organizations upon non-consenting individuals before the court as parties to the litigation[1] should not be cited in this action

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[1] *James v. Marinship Corp.*, 25 Cal. 2d 721.

between private individuals based upon a purely private contract and involving the sanctity of the homes of the contracting parties. Surely, no one has rights in these homes superior to the rights of the owners who were parties to this contract. Judgment for appellants could not deny respondent equal protection of the law and could [fol. 262] have only very slight effect on anyone and that speculative and uncertain. The constitutional right to contract should outweigh such speculative and uncertain considerations.

The District Court of Appeal in Note 17 of the opinion herein cites *Re Wren*, Ont. R. 778, 4 D. L. R. (1945) 674, which is the opinion of a trial judge of Ontario, Canada. That opinion was cited and completely repudiated by the Court of Appeal of Ontario in *Re Noble & Wolf*, Ontario Weekly Notes, 1949, at page 484. We quote from page 487 of the Ontario Weekly Notes, 1949:

> "Henderson J. A. after stating the facts, said that in his opinion the reasons for judgment of Schroeder, J. were right, and the judgment in Re Drummond Wren, *supra*, was wrong in law and should not be followed."

We further quote from page 488 of Ontario Weekly Notes, 1949:

> "Hope J. A. said he agreed fully with Robertson C. J. O. and with the conclusion reached by other members of the court. In view of the reliance placed on the decision in Re Drummond Wren, *supra*, his Lordship wished to add that in his opinion freedom of the individual in and under a democracy had implicit in

The minor premise of my syllogism is: *For a California court to award damages for the breach of such a race restriction covenant would result in judicial enforcement of the discriminatory covenant by state action.*

The conclusion of this syllogism therefore would be: *For a California court to award damages for the breach of a race restriction covenant would be violative of the equal protection clause of the Fourteenth Amendment.*

That the language of the Supreme Court in *Shelley v. Kraemer* is broad enough to contemplate an action for damages for breach of the covenant as coming within the scope of "judicial enforcement" as referred to in that opinion, thereby sustaining my minor premise, has been specifically held in *Roberts v. Curtis*, 93 F. Supp. 604 (1950). In the latter case, the federal district judge, after citing *Hurd v. Hodge*, supra, and *Shelley v. Kraemer*, supra, observed: "I construe the ruling of the Supreme Court as withholding any assistance by way of judicial [fol. 20] action of any kind from the enforcement of such restrictive covenants."

Plaintiffs would avoid the effect of the foregoing conclusion by claiming that the Supreme Court in *Shelley v. Kraemer* held the restrictive agreement standing alone to be valid. They then argue that since the agreement is valid and since the action is only against white defendants, no question of racial discrimination is involved, and an action for damages for breach of the agreement will lie. The decision of the Missouri Supreme Court in *Weiss v. Leaon*, 225 S. W. 2d 127, rendered after the reversal of its prior decision by the United States Supreme Court in *Shelley v. Kraemer*, supra, draws the same distinction as urged by plaintiffs herein.

In my opinion, however, both plaintiffs and the Missouri Supreme Court in *Weiss v. Leaon*, supra, proceed upon an ill-founded premise that the agreements are legal. Such certainly was not the holding of the Supreme Court in *Shelley v. Kraemer*, supra. The language of the Court in that case which apparently has been misconstrued by many readers of the decision concerns the discussion by the Court of the necessity for state action to be involved before a discrimination under the Fourteenth Amendment can occur. Thus the Supreme Court carefully points out that the

Fourteenth Amendment to the federal Constitution is restrictive solely of State governmental action and does not apply to purely private action, observing that "That [fol. 21] amendment erects no shield against merely private conduct, however discriminatory or wrongful." (334 U. S. at p. 13.) And previously, at page 9 of its opinion, the Court had adverted to the necessity for state action by way of judicial enforcement to enter the case before a federal question would be raised, of which the Supreme Court could take cognizance.

In the light of this discussion, the meaning of the Supreme Court becomes clear when it states, on page 13: "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded *as violative of any rights guaranteed* to petitioners *by the Fourteenth Amendment*. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that *there has been no action by the State* and *the provisions of the Amendment have not been violated.*" (Emphasis added.)

Bearing in mind the subsequent declaration of the Supreme Court in the *Shelley* case that judicial enforcement of the discriminatory covenant is state action and as such does violate the Fourteenth Amendment, under the theory of jurisprudence that a judicially enforceable remedy must exist in order for there to be a legally recognized right, the practical recognition by the Supreme Court of the fact that so long as the parties voluntarily adhere to their race restriction agreement, no constitutional question arises, can give plaintiffs little comfort and no support for the mainte- [fol. 22] nance of this action. For in referring to a "voluntary adherence" to such an agreement, it is apparent that the Supreme Court excludes from that term court action between the parties thereto. It necessarily follows that if the parties "voluntarily adhered" to their agreement, not only would there be no constitutional question presented for decision but also there would be no legal question at all before the court, for their would be no breach.

In *Hurd v. Hodge*, 334 U. S. 24, rendered the same day as *Shelley v. Kraemer*, supra, the Supreme Court did not have the necessity for state action in aid of private discrimination before it for consideration, since that case

arose in the District of Columbia. But in that case, the Supreme Court held the federal courts, like the state courts, could not enforce such discriminatory private agreement solely on the ground that so to enforce such covenants would be contrary to the public policy of the United States.

Under the decision of *Shelley v. Kraemer* and *Hurd v. Hodge*, therefore, a prodigious feat of legal legerdemain is required to transfer the passing observation of the Supreme Court to the effect that, so long as the parties voluntarily adhered to their agreement, no question would arise under the Fourteenth Amendment into a holding that such a discriminatory agreement is valid. Such a contention as that advanced by plaintiffs was, as a matter of record, rejected in the recent case of *Claremont Imp. Club v. Buck-*
[fol. 23] *ingham*, 89 Cal. App. 2d 32 (1948). In this case, the District Court of Appeal was asked to rule that plaintiffs were entitled to a judgment for declaratory relief declaring the covenants to be valid on the basis of the previously referred to distinction between the "voluntary adherence to their terms" as contrasted to their unenforcibility "by judicial process." The Court, however, summarily disposed of this request as follows: "Any ruling here under the process of declaratory relief would be no less confusing. . . . If it (the covenant) is unenforcible the whole purpose of the litigation fails." (89 Cal. App. 2d 32, 33.)

Since no action may be brought in either the state or federal courts to enforce the restrictive covenant, no legally cognizable right exists under the covenant which will give rise to an action for damages for its breach.

Plaintiffs' repeated reference to the fact that the action is confined to white defendants does not aid their case. The undiluted fact remains that a covenant such as that involved in the present case is discriminatory on the basis of color and race. As stated by the Supreme Court in *Shelley v. Kraemer*, 334 U. S. at p. 13, "Here *the particular patterns of discrimination* and the areas in which the restrictions are to operate, *are determined*, in the first instance, *by the terms of agreements among private individuals*. Participation of the State consists in the enforce-
[fol. 24] ment of the restrictions so defined." (Emphasis added.) The Court in the *Shelley* case also observed that its prior decisions in *Buchanan v. Warley*, 245 U. S. 60, and

Harmon v. Tyler, 273 U. S. 668, "involved the *rights of white sellers to dispose of their properties* free from restrictions as to potential purchasers based on considerations of race or color." (334 U. S. 1, at p. 12, emphasis added.) It is quite obvious to me that the chief concern of the Supreme Court is that the courts of this country refrain from becoming parties to and agencies of racial discrimination, regardless of whether the action be against whites or non-Caucasians.

Nor can there be any waiver on the part of the white vendors of their right to question the constitutionality of the discriminatory agreements by reason of their having consented to such an agreement in becoming parties to it. Racial discrimination is too portentous a constitutional evil to be enforced by legal action despite the fact that parties voluntarily may agree so to discriminate. For the rights of the classes of people against whom the discrimination is directed are too important to permit recognition by government through its judiciary of a right in the discriminatory agreements which will have the effect of perpetuating them. It would be begging reality to ignore the potential implicit in a judicial recognition of validity of such a restrictive covenant by awarding damages for [fols. 25-28] its breach—a potential of effectuating racial discrimination either by threats of similar coercive action against all who sold to non-Caucasians or by increasing the cost of property to the non-Caucasian based solely on racial factors.

Plaintiffs suggest a hypothetical case in which "John Doe purchased a home, and his neighbor came to him and offered him $1,500.00 if he would promise not to permit his home to be occupied by non-Caucasians. Suppose John Doe accepted the $1,500.00 cash and gave his written promise to his neighbor? Could he then, after a week or so, permit a Negro to move into his house without being liable for damages actually suffered by his neighbor from the said breach?"

The answer to plaintiff's question seems to me obvious and perfectly consistent with the views which I have heretofore expressed. While the promisee could not bring an action to enforce the contract by suing for its breach, he would bring an action for the return of the $1,500.00 on

the ground that the promise was unenforcible. If the court awarded him the return of the consideration, it would not be enforcing the race restriction agreement but rather it would be recognizing its unenforcibility.

The demurrer is sustained without leave to amend.

Dated: March 26, 1951.

Daniel N. Stevens, Judge.

[File endorsement omitted.]

[fols. 29-243] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 574475

OLIVE B. BARROWS, EDGAR W. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Plaintiffs,

vs.

LEOLA JACKSON, DOE I, DOE II and DOE III, Defendants

JUDGMENT FOR DEFENDANT LEOLA JACKSON AFTER ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND—March 29, 1951

In this action, the defendant Leola Jackson, by her attorneys, Sims & Wallbert, by Maurice H. Wallbert, Esquire, having appeared and demurred to the plaintiffs' Second Amended Complaint herein, and the issue of law thereto arising having been duly argued and submitted to the Court for decision, and the Court being fully advised in the premises did heretofore; to wit, on the 26th day of March, 1951, sustain said Demurrer to plaintiff's Second Amended Complaint herein without leave to amend:

Now therefore, it is hereby ordered, adjudged and decreed that plaintiff take nothing by this action as against defendant Leola Jackson, and that plaintiffs' Second Amended Complaint herein be dismissed as to defendant Leola Jackson; and that said defendant Leola Jackson have and recover her costs herein in the amount of $6.00.

Dated this 29th day of March, 1951.

Daniel N. Stevens Judge of the Superior Court.

[fol. 244] IN THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

OLIVE B. BARROWS, EDGAR W. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Plaintiffs,

vs.

LEOLA JACKSON, Defendant and Respondent

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Appellants.

PETITION FOR REHEARING—Filed August 19, 1952

To the Honorable Presiding Justices and the Associate Justices of the District Court of Appeal

Plaintiffs and appellants Olive B. Barrows, *et al.*, respectfully petition for a rehearing after decision by the District Court of Appeal, Second Appellate District, Division Three, and in support of said petition show:

I

The opinion of the District Court of Appeal does not consider the effect of the constitutional principle that the right to make and enforce contracts is one of the civil rights guaranteed by the equal protection clause of the United States Constitution.

[fol. 245] This legal issue was raised in appellants' reply brief on page 35, line 5 *et seq.*

II

The opinion of the District Court of Appeal does not consider the effect of the constitutional guarantee against state law impairing the obligation of contract.

This legal issue was raised in appellants' opening brief at pages 71 *et seq.*

III

The opinion of the District Court of Appeal does not consider the effect upon private contracts of applying the same equal protection test to classifications contained in contracts as is applied to classifications contained in legislation.

This legal issue was raised in appellants' opening brief on page 32, line 30 *et seq.*, and page 17, line 21.

IV

The Opinion of the District Court of Appeal does not consider the effect of the constitutional principle that a defendant or respondent may invoke the equal protection clause of the Constitution only if the facts show that the state action denies him, not another, of equal protection of the laws.

This legal issue was raised in appellants' opening brief on page 16, line 31 *et seq.* and page 28, line 12 *et seq.* and in appellants' reply brief beginning on page 12, line 17.

V

The opinion of the District Court of Appeal does not consider the effect of the fact that the petitioners in the restrictive covenant cases (334 U.S. 1; 92 L. Ed. 1161) were not parties to the covenant relied upon therein. [fols. 246-249] This legal issue was raised in appellants' opening brief on page 9, lines 11-13; page 15, lines 14 *et seq.*, and page 35 lines 4 *et seq.*

VI

The opinion of the District Court of Appeal does not consider the effect of the contention that the "common law rule" held unconstitutional by the *Shelly* case (334 U. S. 1; 92 L. Ed. 1161) was a particular manifestation of the power of the state to create and enforce interests in real property.

This legal issue was raised in appellants' opening brief on page 35, lines 4 *et seq.*, and in appellants' reply brief.

We respectfully submit that the petition for rehearing should be granted and that the judgment appealed from should be reversed and that defendant and respondent should be required to answer the complaint herein.

Respectfully submitted, John C. Miles, Attorney for Appellant M. M. O'Gara; John C. Miles and J. Wallace McKnight, By J. Wallace McKnight, Attorneys for Appellants Olive B. Barrows and Richard Pikaar.

[fol. 250] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OLIVE B. BARROWS, EDGAR W. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Plaintiffs,

vs.

LEOLA JACKSON, Defendant and Respondent,

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Appellants

PETITION FOR HEARING AFTER DECISION BY THE DISTRICT COURT OF APPEAL DENYING A REHEARING

To the Honorable Chief Justice of the Supreme Court of the State of California:

The appellants and each of them respectfully petition the Supreme Court of the State of California for a hearing of the within cause after decision by the District Court of Appeal of the State of California, Second Appellate District, Division III, affirming the judgment of the Superior Court sustaining respondent's demurrer to appellant's second amended complaint.

A petition for rehearing was filed by appellants (your petitioners) with said District Court of Appeal on August 20, 1952, and said petition for rehearing was denied on September 4, 1952.

[fol. 251] *Grounds for Hearing in the Supreme Court*

1. A hearing is necessary for the settlement of important questions of law on the matter of enforcement in damages of a racial restrictive agreement against a defendant and respondent who signed said agreement and received the consideration therefor.

2. A hearing is necessary for the settlement of important questions of law on the matter of appellants' constitutionally guaranteed right to make and enforce contracts and the denial to appellants of the equal protection of the law.

3. A hearing is necessary for the settlement of important questions of law on the matter of action by the state.

court taking the property of appellants without due process of law.

4. It is necessary that a hearing be granted in order to secure uniformity of decision in the State of California respecting the following:

(a) The opinion of the District Court of Appeal ignores the rule laid down in *Perez* v. *Sharp*, 32 Cal. 2d 711, that the constitutionality of state action must be tested on the basis of whether the defendant is affected because of his race.

(b) The opinion of the District Court of Appeal ignores the rule of enforcibility as stated in the case of *San Bernardino County* v. *Way*, 18 Cal. 2d 641, 117 P. 2d 354. [fol. 252] 5. There were substantial legal issues raised in the briefs which were not considered in the opinion; and the failure of the District Court of Appeal to consider said substantial legal issues was set forth in a petition for rehearing, namely:

a. "The opinion of the District Court of Appeal does not consider the effect of the constitutional principle that the right to make and enforce contracts is one of the civil rights guaranteed by the equal protection clause of the United States Constitution.

b. "The opinion of the District Court of Appeal does not consider the effect of the constitutional guarantee against state law impairing the obligation of contract.

c. "The opinion of the District Court of Appeal does not consider the effect upon private contracts of applying the same equal protection test to classifications contained in contracts as is applied to classifications contained in legislation.

d. "The opinion of the District Court of Appeal does not consider the effect of the constitutional principle that a defendant or respondent may invoke the equal protection clause of the Constitution only if the facts show that the state action denies him, not another, equal protection of the laws.

e. "The opinion of the District Court of Appeal does not consider the effect of the fact that the petitioners in the Restrictive Covenant Cases (334 U. S.

1, 92 L. Ed. 1161) were not parties to the covenant relied upon therein.

[fol. 253] f. "The opinion of the District Court of Appeal does not consider the effect of the contention that the 'common law rule' held unconstitutional by the Shelly case (334 U. S. 1, 92 L. Ed. 1161) was a particular manifestation of the power of the state to create and enforce interests in real property."

Report of the Decision of the District Court of Appeal

The opinion of the District Court of Appeal is reported in 112 A. C. A. 613. A copy of the opinion, showing the date of its filing on August 6, 1952, is attached hereto as Appendix "A."

Brief Statement of Facts

On or about the 21st day of October, 1944, appellants Barrows [Clk. Tr. p. 1, lines 21-26] and O'Gara [Clk. Tr. p. 2, lines 12-15], the ancestor in title of appellant Pikaar [Clk. Tr. p. 3, lines 12-14], and respondent Leola Jackson [Clk. Tr. p. 2, line 19] each owned lots in Tract 1462 in the City of Los Angeles. On or about that date, in consideration of the mutual benefit to themselves and their respective properties, said owners, including respondent, executed and caused to be recorded an "agreement imposing restrictions" [Clk. Tr. p. 3, lines 5-19]. By the terms of said agreement, each of the signers promised and bound himself, his heirs, executors, administrators, successors, and assigns, by a continuing covenant that no part of his said real property, described therein, should ever at any time be used or occupied by any person or [fol. 254] persons not wholly of the White or Caucasian race [Clk. Tr. p. 3, lines 21-24]. By the terms of said agreement, each of the signers further promised that this restriction should be incorporated in all papers and transfers of lots or parcels of land of said signers [Clk. Tr. p. 4, lines 1-4]. On or about the 2nd day of February, 1950, respondent Leola Jackson and one Dorothy May Grace executed a grant deed to Pearnell Smalley and Florine Smalley [Clk. Tr. p. 6, lines 15-20]. Respondent Leola Jackson failed to incorporate in said deed the restriction contained in said agreement against use and occupancy by

persons not wholly of the White or Caucasian race, which failure constitutes the first breach of respondents' contract complained of by appellants [Clk. Tr. p. 6, lines 21-26]. On or about the 4th day of September, 1950, persons not of the White or Caucasian race moved into and began to use and occupy the property as to which respondent Leola Jackson had contracted that it would never at any time be used or occupied by persons not of the White or Caucasian race [Clk. Tr. p. 5, lines 18-21]. Said use and occupancy on or about and after the 4th day of September, 1950, constitute the second breach of respondents' contract complained of by appellants. As a result of the breaches of contract, and each of them, appellants have suffered actual and severe depreciation in the value of their property, as alleged in their second amended complaint [Clk. Tr. p. 7, lines 2-8; p. 8, lines 15-20; p. 9, lines 3-8].

[fol. 255] Argument

I

May State Courts Constitutionally Enforce a Racial Restrictive Agreement in Damages Against This Defendant and Respondent Who Signed the Contract and Received the Benefit Contemplated as Consideration?

This is the important question of law to be settled by this appeal. This is the clear and well defined question presented by the opinion of the District Court of Appeal.

It is indisputable that prior to the decision of the United States Supreme Court in the Restrictive Covenant Cases, *supra*, this Court would have permitted recovery by the plaintiff in a case such as this. The only obstacle to the enforcement in damages of the contract in the case at bar is the construction placed upon the decisions in the restrictive covenant cases by the District Court of Appeal.

All other objections which have been raised are contrary to the settled law of this state as articulated in numerous decisions of this court and the District Courts of Appeal. All other objections serve only to confuse and cloud the issue.

The District Court of Appeal most admirably cleared away the clouds and confusion from the question to be

decided and rendered a decision on that question. Your petitioners respectfully submit that the learned court below erred in its decision but did so without confusing the issue.

It is respectfully submitted that this important question of law should be answered in favor of your petitioners, the plaintiffs and appellants herein, for the reasons contained in their opening and closing briefs and reemphasized below in this petition.

[fol. 256]

II

Petitioners' Right to Make and Enforce the Contract Sued Upon Herein Is a Civil Right Guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Petitioners Have Been Denied the Equal Protection of the Law by the Judgment of the Superior Court, as Sustained by the District Court of Appeal

The Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835, have been reaffirmed and followed by the United States Supreme Court in the restrictive covenant cases. The decision in the civil rights cases fully supports your petitioners' position by the use of the following language on page 22:

> "Congress, as we have seen, by the Civil Rights Bill of 1866 . . . undertook to wipe out . . .; and to secure to all *citizens* of *every* race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely: The same right *to make and enforce contracts*, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey, as is enjoyed by white citizens." (Emphasis added.)

[fol. 257]

III

Petitioners' Right to Enforce the Contract Sued Upon Herein Is a Property Right; and by the Judgment of the Superior Court, as Affirmed by the District Court of Appeal, the State Has Withheld From Your Petitioners Due Process of Law and Has Taken Your Petitioners' Property Without Due Process of Law in Violation of the Fourteenth Amendment of the Constitution of the United

States and in Violation of the Constitution of the State of California

It is respectfully submitted that this proposition is abundantly supported by the following authorities cited more fully in appellants' opening brief at page 68:

Morange v. United States (1937), 16 Fed. Supp. 1008;
Boeing Air Transport v. Farley (1935), 75 F. 2d 765, 767;
Lynch v. United States (1934), 292 U. S. 571, 78 L. Ed. 1434;
Worthen Co. v. Thomas, 292 U. S. 426;
People v. Eddy, 43 Cal. 331;
Werner v. So. Cal. Associated Newspapers (1940), 206 P. 2d 952.

[fol. 258]

IV

The District Court of Appeal by Its Decision in the Case at Bar Has Failed to Apply Two Principles of Law Enunciated by This Court

In the case of *Perez v. Sharp* (*supra*) the court said:

> "The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or to any other race, but to the rights of the individuals."

That opinion of this court seems clearly to have required the District Court of Appeal to test the state action sought in the case at bar by whether or not *respondent* would be affected because of her race. Clearly, a judgment for damages against respondent would not affect her because of her race but instead because of her contract.

In the case of *San Bernardino County v. Way* (*supra*), the court said:

> "Nothing is more material to the obligation of a contract than the means of enforcement. The ideas of validity and remedy are therefore inseparable . . ."

The language of the opinions in the restrictive covenant cases makes it very clear that such contracts as the one

involved here are valid. Enforcibility in the case at bar against this respondent follows under the rule stated in the above case.

[fol. 259]

V.

Substantial Legal Issues Were Raised in the Briefs But Were Not Considered in the Opinion of the District Court of Appeal and Were Set Forth in the Petition for Rehearing

A. The Superior Court and the District Court of Appeal, by determining that the contract sued upon cannot be enforced, have impaired the obligation of said contract in violation of Article I, Section 10, of the Constitution of the United States.

Argument A-10 of the appellants' opening brief is hereby incorporated by reference;

B. The reasonable classification test applied to legislative and other action taken by the state without the consent of the individual before the court resisting said action cannot be applied to action taken by the state with consent pursuant to an express contract against the personally consenting party to that contract.

The arguments presented in appellants' opening brief at page 17, line 21 and on page 32, lines 30, *et seq.*, are hereby incorporated by reference.

C. Whether your petitioners, plaintiff and appellants herein, are barred by the Constitution from recovering a judgment for damages against defendant and respondent must be determined solely by whether said defendant and respondent, and not another or others, would be deprived of her constitutional rights.

Tileston v. Ullman, 318 U. S. 44;
Liberty Whse. Co. v. Burley T. G. Coop. M. Assoc., 276 U. S. 71 at 88;
[fol. 260] *Columbia & G. R. Co. v. Miller*, 283 U. S. at 99-100;
Ashwander v. T. V. A., 297 U. S. 288, 347, 348.

It is evident from an analysis of the opinion of the District Court of Appeal that the opinion is based solely upon

a consideration of the indirect and speculative effect of a judgment for appellants upon a class not a party to this action.

The individual non-Caucasian who used and occupied the property as to which respondent contracted could not be affected in any way at all, directly or indirectly, by a judgment for the appellants.

The supposed indirect effect of a judgment for appellants upon persons unknown not of the white or Caucasian race (even if this were a permissible consideration) is purely speculative and, if real, is, for a number of reasons, of too slight practical importance to justify a decision revolutionizing the application of the Constitution to the right to make and enforce contracts. Perhaps chief among these many reasons is the fact that since the 15th day of February, 1950, every applicant for an F. H. A. loan has been required to covenant that he will not execute, etc. any instrument imposing a racial restriction upon the sale or use of the property mortgaged. In addition to that, every mortgagee is required by the Federal Housing Administration to establish that no racial restriction upon the property has been filed of record at any time subsequent to February 15, 1950, and prior to the recording of the mortgage offered for insurance.

[fol. 261] The amendments to the rules of the Federal Housing Commission establishing the above requirements were issued on the 12th day of December, 1949, at Washington, D. C., over the signature of Franklin D. Richards, Federal Housing Commissioner. A copy of these amendments are attached hereto as Appendix "B."

In view of the wide spread use made of F. H. A. insured financing on both new construction, renovation, remodeling and resale, and in view of the intensive private building activity in California, as in other parts of the nation, and in view of the many public housing projects, it must be clear that the ratio of restricted housing to unrestricted housing is not a cause for concern. Any possible indirect effect of a judgment for appellants would be of very slight practical importance. A judgment for appellants would not prevent equal facilities being available to all races. When a non-Caucasian is protected in the use and ownership of his own

it, as an absolute, the freedom of association. (Citing authorities.) This principle had been recognized in such matters as the freedom of association in labor relations, trade associations, and social and other clubs. It seemed untenable to argue that an association of land owners by means of common covenants was contrary to the long accepted principle of freedom of association. Only when such an association became [fol. 263] unreasonable and unduly oppressive of the public generally should it be restricted or avoided either by the courts or by the legislature. His Lordship could find nothing in the scheme of covenants in this case which could be said to be unduly oppressive of the public."

We quote from page 489 of the Ontario Weekly Notes, 1949:

"The present case, in his Lordship's opinion (Hogg J. A.), could not be brought within any of the classes to which the principle of public policy, as recognized by law, was applicable. It was urged that the doctrine of public policy should be extended because of the principles expressed and adopted in the various international charters and documents mentioned in Re Drummond Wren, *supra*, and because of the opinions expressed in judgments of the Supreme Court of the United States. In this respect his Lordship agreed with Schroeder J., and he could not conclude that the covenant now under consideration could be held void upon the grounds of public policy." (Interpretation added.)

Re Noble and Wolf, supra, was appealed to the Supreme Court of Canada and is reported in Canada Law Reports as *Noble, et al. v. Alley* (1951), S. C. R. 64. The opinion of the Court of Appeal of Ontario on the question of public policy was not disturbed by the opinion of the Supreme Court of Canada and therefore stands as the law of the Dominion of Canada. However, the Supreme Court of Canada held that the covenant sued upon was void as a restraint on alienation (covenant against sale) and unenforcible for uncertainty and did not touch and concern the

land and therefore did not run with the land and for these reasons the lower courts were reversed.

[fol. 264] It is, of course, clear that none of the questions involved in either of the Ontario cases is of any importance in California *because the previous decisions of the appellate courts of this state have settled all of these questions* except the last one mentioned above in appellants' favor by approximately one dozen cases directly in point. (See citations App. Op. Br. p. 8 for ten such cases.) Surely, such a uniform line of authorities is sufficient to settle the law of this state. As to the questions of the covenant running with the land, that is not involved here because respondent is the original contracting party.

It is equally clear that the speculative and uncertain indirect effect of a judgment for appellants upon a class not a party to this action is not a proper consideration. This case should be decided solely upon the rights of appellants and respondents.

D. The decisions in the restrictive covenant cases are not in point and cannot properly be relied upon in deciding the case at bar.

The restrictive covenant cases are distinguishable from the case at bar upon the most material facts. The only material fact common to those cases and the case at bar is that in all there are restrictive covenants which are valid. In the restrictive covenant cases the state courts attempted to enforce the contracts against persons who were never parties to those contracts. Here the defendant signed the contract and received the benefit therefor. Other distinctions are also apparent.

The opinion of the District Court of Appeal failed to notice in stating the facts of *Phillips* v. *Naff*, 332 Mich. 389, 52 N. W. 2d. 158, that the defendant in that case also had never executed the contract sued upon.

[fol. 265] E. The common law rule referred to in the opinions in the restrictive covenant cases was the rule of real property which bound the petitioners therein to a contract to which they were not parties.

The opinions in the restrictive covenant cases are ambiguous as to which common law rule of the state when applied by the state courts caused the state action to deny

the petitioners equal protection of the law. The ambiguity is removed by a study of the opinions in connection with the briefs submitted to the United States Supreme Court in those cases. It then appears with clarity that the court referred to the rule of real property which bound petitioners to a contract to which they had not been parties.

Conclusion

For the reasons set forth herein petitioners respectfully request that this court grant a hearing, and that as a result thereof the judgment appealed from be reversed and that defendant and respondent be required to answer the second amended complaint herein.

Respectfully submitted, John C. Miles, Attorney for Appellant, M. M. O'Gara. John C. Miles and J. Wallace McKnight, by J. Wallace McKnight, Attorneys for Appellants, Olive B. Barrows and Richard Pikaar.

[fol. 266]

Appendix "A"

Opinion of the District Court of Appeal

[Civ. No. 18717. Second Dist., Div. Three. Aug. 6, 1952.]

Olive B. Barrows, et al., Appellants,

v.

Leola Jackson, Respondent

Appeal from a judgment of the Superior Court of Los Angeles County. Daniel N. Stevens, Judge. Affirmed.

Action for damages for breach of covenant prohibiting use or occupancy of real property by non-Caucasians. Judgment of dismissal on sustaining demurrer to complaint without leave to amend affirmed.

John C. Miles and J. Wallace McKnight for Appellants.

John W. Preston as *Amicus Curiae* on behalf of Appellants.

Sims & Wallbert and Loren Miller for Respondent.

Rosalind Goodrich Bates, George E. Bodle, James Landye, Basil Feinberg, Saburo Kido, Fred Okrand, Everette Porter, A. L. Wirin, Abraham Gorenfeld, and David Sfskind, as *Amici Curiae* on behalf of Respondent.

VALLÉE, J.

This appeal presents the question whether the equal protection clause of the Fourteenth Amendment of the Constitution of the United States forbids the maintenance in a state court of an action for damages for the alleged breach of a covenant prohibiting the use or occupancy of real property by non-Caucasians. Defendant's demurrer to the complaint was sustained without leave to amend. Plaintiffs appeal from the judgment which followed.

[fol. 267] The facts alleged are these.

On October 21, 1944, three of the plaintiffs, the predecessor of the fourth, and the defendant, the owners of four parcels of realty in Los Angeles, entered into a written agreement by which each bound himself and his successors by a continuing covenant that no part of his realty "be used or occupied by any person or persons not wholly of the white or Caucasian race."

The agreement provided that the restriction should be incorporated in "all papers and transfers" of the lots that the restriction "be a covenant running with the land," that it was for the benefit of all the lots; and that if any of the lots should be used or occupied by any person not wholly of the white or Caucasian race, then in that event the covenantor who covenanted as to that lot, and his successors, would immediately become liable to those covenantors and their successors whose lots were not so occupied for all damages which they may have suffered by reason of the breach. The agreement was recorded May 8, 1945.

On February 2, 1950, defendant and one Grace executed a grant deed, which was recorded, by which they conveyed one of the restricted lots to the Smallys. Defendant did not incorporate the restrictions in the deed nor make any reference therein to the agreement.

On September 3, 1950, defendant moved out of the house on the lot conveyed, and on September 4, 1950, persons not of the Caucasian race moved in and began to use and occupy

the same. When defendant moved out of the house "she did so in order to permit persons known to her to be other than the Caucasian race to move into and occupy said house, [fol. 268] and with the intention that persons not of the Caucasian race should move into and occupy said house." Defendant, in violation of said agreement, has permitted persons not wholly of the white or Caucasian race to occupy the property, and such occupancy is for residence. Damage, claimed depreciation in the value of plaintiffs' properties, is alleged.

Plaintiffs assert they are entitled to recover damages for breach of contract in two respects: (1) for failure of defendant to incorporate the restrictive agreement in her conveyance to the Smallys, and (2) as an original covenantor. Defendant counters (1) a cause of action is not stated for failure to incorporate the restrictive agreement in the conveyance because the Smallys took title with constructive notice of its terms; (2) a cause of action is not stated for permitting the use and occupancy of the realty by non-Caucasians because a covenantor is not liable for the subsequent breach of the covenant by a subsequent owner; and (3) a cause of action is not stated because of applicable provisions of the state and federal Constitutions. Plaintiffs reply (1) a cause of action for failure to incorporate the restrictive agreement in the conveyance is stated because in any event they would be entitled to nominal damages under Civil Code, section 1466; (2) a cause of action is stated because defendant made a valid agreement that something would not be done: when use and occupancy by a non-Caucasian occurred that which defendant agreed would not be done was done, for which defendant is liable in damages; and (3) enforcement of the agreement is not prohibited by any provision of the state or federal Constitution.

[fol. 269] We first consider whether a cause of action is stated for damages for breach of contract, under common law principles.

There is privity of contract between three of the plaintiffs and the defendant. Each was an original party to the covenant and contractually assumed its obligations. Each contracted concerning the use and occupancy of his

land. Each bound himself that should his lot be used or occupied by non-Caucasians he would become liable to the others for whatever damage they may have suffered. As between themselves, in the absence of fraud or mistake, they are conclusively bound by their covenants if they are not contrary to public policy or violative of constitutional limitations.[1] When the lot as to which defendant covenanted was used and occupied by non-Caucasians liability occrued

An action for breach of a covenant is an action on a contract. The ordinary remedy for the nonfulfillment of a covenant is that the delinquent party must respond in damages.[2] The fact that other remedies may be available [fol. 270] to plaintiffs does not preclude their resort to an action for damages.[3]

Goldberg v. Nicola, 319 Pa. 183 [178 A. 809, 98 A. L. R. 774], relied on by defendant, is not analogous. There it was held that a covenantor of a benefit attached to land is not liable, after parting with his title, for a breach occasioned by possessors of the land subject to the covenant. The holding stemmed from the fact that there was no personal responsibility apart from privity of estate.

It is not essential that we determine whether the covenant is in fact one running with the land, as de endant

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[1] Los Angeles Terminal Land Co. v. Muir, 136 Cal 36, 42 [68 P. 308].

[2] Joyce v. Krupp, 83 Cal. App. 391, 397-398 [257 P. 124]; Borden v. Boyvin, 55 Cal. App. 2d 432, 436 [130 P. 2d 718]. See, also, Pedro v. County of Humboldt, 217 Cal. 493 [19 P. 2d 776]; Knight v. Black, 19 Cal. App. 518, 522 [106 P. 512]; Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 402 [152 P. 935]; Pratt-Low Preserving Co. v. Evans, 55 Cal. App. 724, 731-732 [204 P. 241]; Eason v. Buffaloe, 198 N. C. 520 [152 S. E. 496]; Wyatt v. Adair, 215 Ala. 363 [110 So. 801]; 21 C. J. S. 982, §114; 14 Am. Jur. 663, §336; Clark, Covenants and Interests Running with Land, 2d ed., 172.

[3] Agreements such as here involved have heretofore been held to constitute a lawful exercise of the freedom to contract as such to be enforceable by the courts. (Cummings v. Hoke, 31 Cal. 2d 844-845 [193 P. 2d 742].)

argues, although the complaint alleges that the agreement provided that it was, and the fact is admitted by the demurrer.[4] If the covenant runs with the land, defendant, as an original covenantor, is not absolved thereby from the obligation of the covenant.[5]

We hold that apart from the constitutional issue the complaint states a cause of action for damages.

Since we so conclude, it is not necessary to decide whether a cause of action is stated for the failure of defendant to [fol. 271] incorporate the restrictive agreement in her conveyance to the Smallys.[6] We pass to consideration of the issue of constitutional power.

The parties agree, as they must, that the covenant, as such, is constitutionally a valid agreement;[7] that the conveyance by defendants to the Smallys was valid;[8] and that title passed.

In 1948 the Supreme Court of the United States decided Shelley v. Kraemer and McGhee v. Sipes, 334 U. S. 1 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441], and Hurd v. Hodge and Urciolo v. Hodge, 334 U. S. 24 [68 S.

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[4] See Civil Code, sections 1461, 1468; Weller 1. Brown, 160 Cal. 515, 518-519 [117 P. 517]; Berryman v. Hotel Savoy Co., 160 Cal. 559 [117 P. 677, 37 L. R. A. N. S. 5]; Moe v. Gier, 116 Cal. App. 403 [2 P. 2d 852]; 7 Cal. Jur. 724, sec. 13.

[5] Pratt-Low Preserving Co. v. Evans, 55 Cal. App. 724, 728-729 [204 P. 241]; see Reno, "Equitable Servitudes in Land," 28 Va. L. Rev. 951, 962; Burby, "Land Burdens in California," 4 So. Cal. L. Rev. 343, 354; Ming, "The Restrictive Covenant Cases," 16 Univ. Chicago L. Rev. 203, 209, footnote 21.

[6] See Wayt v. Patee, 205 Cal. 46, 49-53 [269 P. 660]; Robertson v. Nichols, 92 Cal. App. 2d 201, 206-207 [206 P. 2d 898]; Oliver v. Hewitt, 191 Va. 163 [60 S. E. 2d 1, 2, 23 A. L. R. 2d 516]; Stanley v. Greenfield, 207 Ga. 390 [61 S. E. 2d 818, 819, 21 A. L. R. 2d 1256]; Anno. 4 A. L. R. 2d 1364, 1371.

[7] Anno. 14 A. L. R. 2d 153.

[8] Civ. Code, §§711, 715; Los Angeles Inv. Co. v. Gary, 181 Cal. 680 [186 P. 596, 9 A. L. R. 115].

Ct. 847, 92 L. Ed. 1187], generally referred to as the Restrictive Covenant Cases. The admonition of these cases is that a state may not by judicial process enforce private rights derived from consensual agreements of private individuals where to do so would result in the infringement of civil liberties guaranteed by the Constitution of the United States.

Long prior to the Restrictive Covenant Cases, Judge Erskine M. Ross of the United States Circuit Court, the donor of the American Bar Association's Ross Essay prize, in Gandolfo v. Hartman (1892 C. C. S. D. Cal), 49 F. 181 [fol. 272] [16 L. R. A. 277], was the first judicial voice to hold enforcement of a racial restrictive covenant prohibiting the use of real property by persons of a specified race invalid on constitutional grounds.[9, 10] Other than Gandolfo v. Hartman, *supra*, judicial enforcement of covenants which have for their purpose the exclusion of persons of a specified, or anyone not of a designated, race from the use or occupancy of real property, was uniformly sustained over constitutional objections founded on the Fourteenth Amendment, including the equal protection clause and the due process clause.[11]

[9, 10] Referring to the equal protection clause of the Fourteenth Amendment, Judge Ross said (p. 182):

"It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear."

[11] Anno. 3. A. L. R. 2d 477.

The restriction in the Shelley case[12] was embodied in an agreement signed by thirty property owners of a St. Louis neighborhood. The agreement declared that no part of the property shall be occupied by any person not of the Caucasian race, and specifically restricted its use against occupancy by Negroes and persons of the Mongolian race [fol. 273] for 50 years. One of the parcels was conveyed to Shelley, a Negro. An owner of property covered by the restrictions brought suit. The relief sought and granted by the Missouri court was an injunction restraining Shelley from taking possession of the covenanted parcel and a decree divesting him of title and revesting the title in his immediate grantor. The restrictive agreement in McGhee v. Sipes provided that the property should not be used or occupied by any person or persons except those of the Caucasian race. Injunctive relief was granted by the Michigan court.

The Supreme Court of the United States in these cases held: (1) private agreements which have for their purpose the exclusion of persons of designated race or color from the use or occupancy of real property, standing alone, do not violate any rights guaranteed by the Fourteenth Amendment;[13] (2) the actions of state courts and judicial officers are actions by the states within the meaning of the Fourteenth Amendment; (3) in granting judicial enforcement of such private agreements the courts of Missouri and Michigan acted to deny the excluded races the equal protection of the laws, contrary to the Fourteenth

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[12] 334 U. S. 1 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].

[13] The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment: (4) denial of access to the courts to enforce [fol. 274] such restrictive covenants does not deny equal protection of the laws to the parties to such agreements.[14]

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[14] The Court in part said (334 U. S. 1, 4 *et seq.*):

"These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property.

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"It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; 'simply that and nothing more.'

"It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

"'All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.'

"This Court has given specific recognition to the same principle. (Buchanan v. Warley, 245 U. S. 60 [62 L. Ed. 149, 38 S. Ct. 16.]

"Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

"Since the decision of this Court in the Civil Rights Cases, 109 U. S. 3 [3 S. Ct. 18, 27 L. Ed. 835] (1883), the principle has become firmly embedded in our constitutional [fol. 275] law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

"We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. *Cf.* Corrigan v. Buckley, *supra* [271 U. S. 323, 70 L. Ed. 969, 46 S. Ct. 521].

"But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment.

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"These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see

fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

"The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular [fol. 276] pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

"We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives

sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear.

. . . . . .

"Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. *Cf.* Marsh *v.* Alabama, 326 U. S. 501 [66 S. Ct. 276, 90 L. Ed. 265] (1946).

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"The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment." (334 U. S. 1 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].)

D. O. McGovney, Professor of Law, University of California, in 1945, plotted the pattern for Shelley *v.* Kraemer in "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional," 33 Cal. L. Rev. 5.

[fol. 277] Hurd *v.* Hodge and Urciolo *v.* Hodge [15] arose in the District of Columbia. The restrictive covenant provided that specified lots should never be rented, leased, sold, transferred or conveyed to any Negro or colored person under a penalty of $2,000, a lien against the property. The defendants were Negro purchasers of some of the restrictive properties and a white person who had conveyed some of the properties to them and who owned other restricted lots. The lower court declared null and void the deeds to the Negro purchasers, enjoined the defendant white property owner from leasing, selling, or conveying the properties to any Negro or colored person, and enjoined the Negro defendants from leasing or conveying the properties and directing them to remove from the properties.[16] Among other things the Supreme Court stated that it had held in [fol. 278] the Shelley case that the Fourteenth Amendment forbids discrimination whereby a colored man is deprived of

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[15] 334 U. S. 24 [68 S. Ct. 847, 92 L. Ed. 1187].

[16] "The problem of racial residence restrictions is not peculiar to Negroes, although constituting nearly a tenth of our citizenry they are the largest group affected. In the Pacific Coast states discriminatory restrictions usually proscribe all non-Caucasians, both citizens and aliens. In the Southwest it is common specifically to proscribe Mexicans and American citizens of Mexican descent, *e. g.*, 'persons commonly called Mexicans.' A residential subdivision adjacent to Fresno, California, is covered by restrictive agreements 'that neither said premises, nor any part thereof, shall be used in any manner whatever or occupied by any Negro, Chinese, Japanese, Hindu, Armenian, Asiatic, or native of the Turkish Empire, or descendant of above named persons; provided however, that such a person may be employed by a resident upon said property as a servant for such resident.' Armenians and nearly all natives of the Turkish Empire are whites, or members of the Caucasian race. From a constitutional standpoint there seems to be no distinction between state enforcement of prejudice against all Negroes or all Chinese and state enforcement of prejudice against some subdivision of the white race, such as all Armenians or all Jews." (33 Cal. L. Rev. 15.)

the right to acquire property free from interference imposed by state courts in the enforcement of restrictive covenants, and "that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States."[17]

The precise question in the case at bar is narrowed to this: Does the maintenance of an action at law for damages by an original covenantee against an original covenantor for breach of a restrictive covenant which has for its purpose the exclusion of non-Caucasians from the use and occupancy of real property, constitute such enforcement of the covenant as to violate the equal protection clause of the Fourteenth Amendment?

Since the decisions in the Restrictive Covenant Cases, the question in the present case has arisen in Weiss v. Leaon (1949), 359 Mo. 1054 [225 S. W. 2d 127], Roberts v. Curtis (1950, D. C. Dist. Col), 93 F. Supp. 604, Correll v. Earley [fol. 279] (1951, — Okla. — [237 P. 2d 1017], and Phillips v. Naff (1952), 332 Mich. 389 [52 N. W. 2d 158].[18]

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[17] James *v.* Marinship Corp., 25 Cal. 2d 721 [155 P. 2d 329, 160 A. L. R. 900], involved exclusion of Negroes by a union. The court, *inter alia*, said (pp. 739, 740):

"The discriminatory practices involved in this case are, moreover, contrary to the public policy of the United States and this state. The United States Constitution has long prohibited governmental action discriminating against persons because of race or color. (5th, 14th, and 15th Amendments.) . . . Although the constitutional provisions have been said to apply to state action rather than to private action, they nevertheless evidence a definite national policy against discrimination because of race or color." (Yoshida *v.* Gelbert Imp. Co. (1946), 58 Pa. D. & C. 321, 34 Del. Co. 443, and *Re* Wren, Ont. R. 778, 4 D. L. R. (1945) 674, held racial restrictive covenants void on the ground of public policy.

[18] In Clifton v. Puente (1948, Tex. Civ. App.), 218 S. W. 2d 272, the restrictive covenant prohibited the sale or lease of the property to "persons of Mexican descent." Puente, a citizen of Mexican descent, acquired title. A covenantee sued to cancel the deed. Puente cross-complained for a de-

Weiss v. Leaon [19] was an action to enforce a racial restrictive covenant by injunction or, in the alternative, to recover damages for its breach. The covenant, created by private agreement, was that none of the lots in the restricted area be sold to or occupied by Negroes. The court held that the action was properly dismissed insofar as it sought injunctive relief but that the petition stated a claim for damages. The court read the Shelley case as merely holding that specific performance of a racial restrictive covenant by judicial decree is a violation of the Fourteenth Amendment, and that it does not proscribe [fol. 280] an action for damages for breach of such a covenant between parties under the agreement.[20]

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cree quieting title. In holding for Puente the court said, page 274: "Without affirmative enforcement of the racial covenant involved, it would seem that the scheme of restriction applicable to the subdivision of which the property here involved is a part can not be effectively realized, should voluntary methods fail. . . . It is as much an enforcement of the covenant to deny to a person a legal right to which he would be entitled except for the covenant as it would be to expressly command by judicial order that the terms of the covenant be recognized and carried out. No valid distinction can be predicated upon the position of a party (alleged to be an ineligible grantee) as a plaintiff or as a defendant. Under the decision of the Supreme Court, above referred to, judicial recognition or enforcement of the racial covenant involved here by a state court is precluded by the 'equal protection of the laws' clause of the Fourteenth Amendment.'"

[19] 359 Mo. 1054 [225 S. W. 2d 127].

[20] Referring to the Restrictive Covenant Cases the court stated (p. 130):

"Thus the Supreme Court holds that specific performance of a racial restrictive agreement by judicial decree is a violation of the Fourteenth Amendment, although the agreement itself is constitutionally valid. The question whether the Fourteenth Amendment also forbids an action for damages for the breach of a restrictive agreement between parties under the agreement was not raised or discussed.

"Except for the constitutional issue advanced under

In Correll v. Earley[21] the restrictive covenant was contained in an agreement between lot owners in one block in Oklahoma City. They covenanted that no owner should sell, lease, or give away any property in the block to any person of the Negro or African race. There were two causes of action: one to cancel deeds by two owners to an insolvent dummy and from the dummy to Negroes, the other for damages—alleged diminution in the value of the [fol. 281] plaintiff's lots because the conveyances were the consummation of a conspiracy to wilfully violate the covenant. The lower court sustained a general demurrer to the petition. On appeal it was held that the Restrictive Covenant Cases controlled so far as it was sought to cancel the deeds but that a cause of action for damages

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Shelley v. Kraemer there is no question under the general law but that the remedy of damages for breach of the agreement would be available. . . .

"In the case at bar the restrictive covenant may not now be specifically enforced because Shelley v. Kraemer has held judicial enforcement violates the Fourteenth Amendment.

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"Since Shelley v. Kraemer also found the restrictive agreement itself, made by private parties, was valid as against the charge of unconstitutionality, it may follow that an action for its breach, rather than its enforcement, might lie. For the breach of a valid agreement there is ordinarily a remedy by way of damages. The fact that another remedy, specific performance, is ruled out because of constitutional reasons, need not necessarily affect the remedy by way of damages unless it, too, is unconstitutional under the circumstances.

"Under the facts of this case, we hold that according to the law as we now understand it, the trial court may hear and determine an action for damages for the breach of the restriction agreement in question between plaintiffs and defendants Leaon without violating any provision of the Federal or State Constitutions. We are of the opinion that an action for damages for the breach of a valid agreement need not be affected by the Fourteenth Amendment." (359 Mo. 1054 [225 S. W. 2d 127].)

[21] Okla. [237 P. 2d 1017].

was stated. The court reasoned that the rule of the Restrictive Covenant Cases did not apply against the plaintiffs' right to collect damages if they had actually been damaged by the violation of a valid contract by the defendants as the consummation of a conspiracy to so violate it with the wilful intent to thereby damage the plaintiffs.[22]

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[22] The court referring to the Restrictive Covenant Cases, said (p. 1021 [237 P. 2d]):

"The rule of these Federal decisions would support the trial court in part, but only in part. Those decisions follow the rule that the State may not discriminate against a defendant on account of his race. It was there held that if the State, through the court, should forbid conveyance of property to a party because of his race, with the application or use of the power of the State to compel obedience to the decree which would naturally result, that would amount to a discrimination by the State in violation of the Federal Constitution.

"But this is no rule against plaintiffs' right to collect damages if plaintiffs have actually been damaged by the violation of a valid contract, violated by defendants as the consummation of a conspiracy to so violate it, with the wilful intent to thereby damage these plaintiffs.

"This is a valid contract between the white citizens who made it. That is true under the rule of the Federal decisions above cited. They expressly so say. In Shelley v. Kraemer, *supra*, it was contended that such a restrictive agreement was invalid but the Supreme Court of the United States denied that contention, holding that the contract was valid, although power was withheld from the State courts to enforce it as against Negro purchasers. . . .

"Those of the defendants who are white citizens and were bound by this valid contract conspired together to violate the contract for the intended purpose of doing damage to plaintiffs and their property. The Negro defendants knowingly joined with them in the conspiracy for the same intended purpose. We are compelled to take this as true

because it is specifically alleged by the plaintiffs and is admitted by the demurrers. . . .

"So we have this situation: the plaintiffs have a valid contract in protection of their home and property; the courts may not cancel the deed made to Negroes in violation of the contract because the application of the Federal rule deprives the courts of power to do so, or in other words, the court must decline to cancel the deed lest by so doing they conduct the State into an act of discrimination against its Negro citizen.

"But no such thought need deter the courts in the matter of mere compensatory damages, or punitive damages if wilful wrongdoing justifies such damages. That is to say, if the court requires a white owner of real estate to pay damages, which he intentionally and purposely caused, in direct violation of a valid written contract, of which he had knowledge and to which he was or became a party, that act or judgment by the court would not constitute any act of discrimination by the State against a Negro citizen. None of the defendants had any legal right to conspire to knowingly injure the value of the property of another citizen. . . .

"If the contract, despite its restrictive covenants, is valid, as held by the United States Supreme Court, and if the defendants conspire to violate it, with knowledge and intention that in so doing they will cause damage to the plaintiffs and they consummate the scheme and cause the intended damage, all of which is admitted by the demurrers, the defendants would be liable to plaintiffs for damages sustained.

"Under the Federal ruling in the cited cases defendant white owners could convey a legal title to the Negro purchasers and the Negro purchasers could legally purchase such properties. But since the restrictive contract was valid the white seller would act at his peril of being required to pay plaintiffs damages for breach of a valid contract between himself and other lot owners. Here it is charged that, in order to evade being required to pay damages for his breach, the original white owner, who might have been financially responsible, entered into a conspiracy to convey to one who was without financial responsibility,

[fol. 282] Roberts v. Curtis,[23] which arose in the District of Columbia, was an action for damages for breach of a [fol. 283] restrictive covenant not to sell to Negroes. In dismissing the action the court, referring to the Shelley and Hurd cases, said: "The Supreme Court further held that it was contrary to the Fourteenth and Fifteenth Amendments to the Constitution and contrary to public policy to aid in the enforcement of such covenants by judicial proceedings. Although the actions involved in those cases were suits for injunctions, the ruling is broad enough to cover actions for damages as well. I construe the ruling of the Supreme Court as withholding any assistance by way of judicial action of any kind from the enforcement of such restrictive covenants."

Phillips v. Naff[24] was an action at law for damages for an alleged breach of a reciprocal racial restrictive covenant. The covenant, contained in a recorded agreement, restricted use and occupancy of the property to white persons of "pure Caucasian race," and provided it should run with the land. Defendant, a restricted lot owner, conveyed to Negroes and placed them in possession and occupancy. The plaintiffs were owners of other restricted lots. The trial court dismissed the action. Affirming, the

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the latter to convey to the Negro purchaser. Under the demurrer we must assume this to be true. Thus it was intended to cheat and deprive plaintiff of his right to pursue a solvent seller on his claim of damages for breach of contract. This is one vice of the conspiracy. If the conspiracy was vicious, all parties participating therein are liable for any injury sustained by plaintiffs as a result of the conspiracy. All acts done in carrying out the conspiracy were extraneous to the mere sale of property to Negro purchasers, and extraneous to the performance or nonperformance of the restrictive contract.

"This action alleging the conspiracy is grounded in tort." (Okla. [237 P. 2d 1017].)

[23] 93 F. Supp. 604.

[24] 332 Mich. 389 [52 N. W. 2d 158].

Supreme Court of Michigan, quoting at length from Shelley v. Kraemer,[25] said (p. 161):

"On behalf of appellants it is conceded that, in view of the decision in Shelley v. Kraemer, *supra*, they may not maintain an equitable suit for injunction relief. They insist, however, that an action for damages under the factual situation set forth in the declaration is not one [fol. 284] for the enforcement of the discrimination, and is not within the inhibition of the 14th amendment. We think that the statement in the language above quoted that state action is not involved so long as the purposes of agreements are effectuated by 'voluntary adherence' to their terms is significant. Plaintiffs' action for damages may not be regarded as involving individual conduct solely. The aid of the court is invoked on the theory that the agreement is valid as between the parties who signed it and their successors in title, and that the state acting through the courts will permit the recovery of damages for failure to observe it. In other words, plaintiffs assert the right to invoke state action within the meaning of the term as discussed in Shelley v. Kraemer, *supra*.

"We are in accord with the view of the trial judge that *liability to suits for damages for breach of a reciprocal racial restriction constitutes an indirect method of enforcement*. In the instant case it is obvious that if plaintiffs are entitled to recover damages the owners of other lots in the restricted area may do likewise. It is a reasonable assumption that the owner of a restricted lot having the opportunity and desiring to sell to a purchaser not of the Caucasian race would be reluctant to do so if plaintiff's position is correct. It may be noted, also, that since the restrictive covenant runs with the land, defendants' grantees, who are, it appears, now in possession, hold the property subject thereto. The question naturally suggests itself, under plaintiff's theory, as to the liability of the present owners for damages in the event that they convey the property to a grantee of their own race." (Italics added.)

[fol. 285] The Supreme Court of Michigan declined to

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[25] 334 U. S. 1 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].

follow the Missouri supreme Court, saying of Weiss v. Leaon:[26]

"The decision of the Missouri court sustaining the count for damages must be regarded as supporting plaintiffs' theory in the case at bar. However, we are not in accord with such decision. As above suggested, if a sale of property subject to a reciprocal racial covenant cannot be made without rendering the grantor liable to suits for damages, such fact, it may be assumed, would operate to inhibit freedom of purchase by those against whom the discrimination is directed, and also to place a burden on the right of an owner to sell to a purchaser of his own selection. We think the reasons on which the decision of the United States Supreme Court in Shelley v. Kraemer, *supra*, were based operate in bar of an indirect method of enforcement, and are sufficiently broad in scope as to cover the rights of those affected in the instant controversy. The 14th amendment, as construed, prevents the maintenance of the action for damages instituted by plaintiffs."[27]

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[26] 359 Mo. 1054 [225 S. W. 2d 127].

[27] Since Shelley, the courts of this state have uniformly held that state court injunctive enforcement of a private racial restrictive covenant as to occupancy of land is state action which denies persons of the excluded race their right to equal protection of the laws, and therefore violates the Fourteenth Amendment. (Cumings v. Hokr, 31 Cal. 2d 844 [193 P. 2d 742]; *In re* Laws, 31 Cal. 2d 846 [193 P. 2d 744]; Cassell v. Hickerson, 31 Cal. 2d 869 [193 P. 2d 743]; Davis v. Carter, 31 Cal. 2d 870 [193 P. 2d 744]; Lippold v. Johnson, 32 Cal. 2d 892 [197 P. 2d 161]; Back v. Young, 32 Cal. 2d 892 [197 P. 2d 161]; Thompson v. Clarke, 32 Cal. 2d 892 [197 P. 2d 161]; Meriweather v. Fleming, 32 Cal. 2d 893 [197 P. 2d 161]; Mayer v. Robinson, 32 Cal. 2d 893 [197 P. 2d 161]; Pearce v. Croker, 32 Cal. 2d 893 [197 P. 2d 161]; Cavett v. Butler, 32 Cal. 2d 894 [197 P. 2d 161]; Clayton v. Wilkins, 32 Cal. 2d 895 [197 P. 2d 162]; Morin v. Crane, 32 Cal. 2d 896 [197 P. 2d 162]; Coleman v. Stewart, 33 Cal. 2d 703 [204 P. 2d 7]; Matthews v. Andrade, 87 Cal. App. 2d 906 [198 P. 2d 66]; Claremont Imp. Club v. Buckingham, 89 Cal. App. 2d 32 [200 P. 8d 47].) In Morin v. Crane,

[fol. 286] We are in accord with the Supreme Court of Michigan. We think the Supreme Courts of Missouri and Oklahoma misread the Restrictive Covenant Cases. The Missouri court in Weiss v. Leaon[28] confused "enforcement" with "specific enforcement." It interpreted the holding of Shelley in the narrowest possible light when it said the Supreme Court intended to foreclose only one means—specific performance—of judicial action in support of racial restrictive covenants, while leaving available an action for damages for breach of such covenants. The Oklahoma case, Correll v. Earley,[29] perhaps may be distinguished on the ground that it was a tort action for damages resulting from a wilful, malicious conspiracy. Language in the opinion cannot be reconciled with the Shelley case.

An analysis of the opinion in the Shelley case points to but one conclusion, *i. e.*, the Fourteenth Amendment forbids the maintenance of an action for damages for breach of a racial restrictive covenant. The question in that case did not relate to the nature of the relief sought but, as stated by the court, related to the "validity of court enforcement" of such covenants. The question was "whether the equal protection clause of the Fourteenth [fol. 287] Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color."[30]

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supra, the court said: "[W]e do not reach the question as to whether any tenable cause of action for relief or recovery other than specific enforcement of the racial restrictions is, or could be, stated."

[28] 359 Mo. 1054 [225 S. W. 2d 127].

[29] Okla. [237 P. 2d 1017].

[30] "One of the great purposes of the Fourteenth Amendment was to lift the Negro from his slavery to a plane of perfect equality of civil rights with all other persons and to remove from his enjoyment of them all obstructions based on race or color. Among the absolute civil rights to be protected from discriminatory action by the state are the rights to inherit, purchase, lease, sell, hold and convey real and personal property. Not only has the Civil Rights Act defined these basic rights so that there can be no doubt

In holding that it did, the court pointed out that restrictions on the right of occupancy, if imposed by state statute or local ordinance, could not be squared with the requirements of the Fourteenth Amendment; and if created by private agreement, they likewise could not be squared with the requirements of the Amendment where the purposes of the agreement are secured by judicial enforcement by state courts, since judicial enforcement is action of the state for the purposes of the Amendment. The court declared that the "Amendment erects no shield against merely private conduct, however discriminatory or wrongful," and said (p. 1180, 92 L. Ed.):

"We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear [fol. 288] *clear that there has been no action by the State and the provisions of the Amendment have not been violated.* [Citation.] [31]

"But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreement." (Italics added.)

The unmistakable implication from the italicized statement is that unless adherence is voluntary the purposes of the covenant cannot be effectuated.[32] One does not

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of them, but in its declaration that all citizens should enjoy them equally it has expressed a condition regarded as essential by the framers of the Fourteenth Amendment. It seems clear, therefore, that state action of any kind which prevents this equality by denying to citizens of the United States the equal protection of its laws is forbidden and nullified by this amendment." (24 N. Y. Univ. L. Q. Rev. 230-231; see *Ex parte* Virginia, 100 U. S. 339, 344 [25 L. Ed. 676].)

[31] The same statement was made in the Hurd case and in each instance was preceded by the word "we."

[32] Racial restrictive covenants are valid so long as their purposes are achieved by voluntary adherence of the

voluntarily refrain from doing an act when by doing the act one may be subjected to an action for damages and one's property be taken by execution. It was pointed out that the Civil Rights Cases[33] declared that the Fourteenth Amendment makes void "State action of every kind" which is inconsistent with the guarantees therein contained.

[fol. 289] The opinion in the Shelley case contains this very pertinent statement (p. 1184, 92 L. Ed.):

"Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."

And (p. 1185, 92 L. Ed.):

"Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws

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parties irrespective of the unjust discrimination; for it is the right of every property owner to decline to permit the use and occupancy to any individual or class. Anno. 14 A. L. R. 2d 153.) The covenant is constitutionally valid but unenforceable. Valid but unenforceable agreements are not unknown to the law. They exist in cases affected by the statute of frauds (lack of writing), the statute of limitations (undue time), and in cases of unconscionable bargains.

[33] In the Civil Rights Cases, 109 U. S. 3, 11 [3 S. Ct. 18, 27 L. Ed. 835], Justice Bradley stated that the Amendment: ". . . nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws."

to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

The court in the Shelley case did not go part of the way; it went all of the way. The thrust of the decision is aimed at prohibition of judicial participation in the maintenance of racial residential segregation. It erected a broad barrier to segregation by judicial decree. The holding that judicial enforcement of racial restrictive covenants is prohibited carries meaning only if that prohibition extends to enforcement, whether it is sought in equity or at law. Shelley holds not that enforcement of the covenant is against principles of equity, but that judicial enforcement of racial restrictive covenants denies equal protection of the laws. [fol. 290] We know of no precedent for the proposition that when specific performance of a contract is forbidden because such a decree is unconstitutional, an alternative remedy for damages may be granted: Each necessarily calls upon the courts for action; each is, therefore, equally state action and equally within the proscription of the Fourteenth Amendment.

The Fourteenth Amendment does not proscribe individual action; but when, as here, the aid of a court is sought to compel one of the parties to the restrictive covenant to abide by its terms by subjecting him to an action for damages because of use or occupancy of the property by non-Caucasians—it is no longer a matter of individual action: it is one of state participation in the maintenance of racial residential segregation. Racial discrimination is inherent in the covenant; its purpose and impact is to prevent the use or occupancy of real property by non-Caucasians, to segregate non-Caucasians, "simply that and nothing more."[34] The basic pattern of racial discrimination is as much the same in an action for damages as it is in a suit in equity. The maintenance of an action for damages against an original covenantor would aid and encourage the discrimination, not by preventing a non-Caucasian from using or

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[34] Shelley v. Kraemer, 334 U. S. 1, 10 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].

occupying the property, but by holding a covenantor liable in damages upon the happening of that contingency, a liability which would not be incurred if the property were used or occupied by a Caucasian.

The doctrine of the Shelley case, as we read it, means that no state sanction, direct or indirect, can constitu- [fol. 291] tionally be imposed for the breach of a restrictive covenant if such sanction would result in the denial of any civil right guaranteed by the Constitution. Of the civil rights conferred, none is clearer and few more vital than the right to buy a home and live in it. Distinction between direct and indirect state action is tenuous. The enforcement of a covenant by an action for damages furnishes a prepotent motive to prevent use or occupancy of property by non-Caucasians; that is, the indemnification of other property owners when a non-Caucasian uses or occupies the property. The coercive device of retribution in the form of damages is as effective as the coercive effect of injunctive relief, although not as immediate. In addition to the likelihood of being subjected to a money judgment, the vexation and expense of a lawsuit enhances the coercion. There can be no doubt that the threat to a covenantor of liability in damages, with consequent execution and sale, for disregarding a racial restrictive covenant, would operate as a deterrent to the breaching of its terms; and, in the words of the Supreme Court of Michigan, "would operate to inhibit freedom of purchase by those against whom the discrimination is directed." When a court undertakes to buttress that threat by lending its power to give effect to the covenant, the court is facilitating the discriminatory purpose of the covenant and extending the "full panoply of state power" [35] to its practical effectiveness.[36]

[fol. 292] The fact that the non-Caucasian is not a party to the action, and that an award of damages operates against the convenantor directly rather than directly

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[35] Shelley v. Kraemer, 334 U. S. 1 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].

[36] See "Discrimination in Ownership and Occupancy of Property since Shelley v. Kraemer," U. C. L. A. Intramural Law Rev. June, 1952.

against the non-Caucasian, does not affect the result.[37] In an action at law for damages the rights and interest of the particular non-Caucasian would be secure and unaffected by any judgment rendered. However, enforcement of the covenant would effectively deny non-Caucasian citizens equality in the enjoyment of property rights because property owners in restricted areas are deterred from permitting use or occupancy by non-Caucasians lest they be personally liable for damages. No person has the right, nor does the state have the power, to require the enforcement of a covenant which will result in the denial to any individual of the equal protection of the laws. Any recognition of a racial restrictive covenant in an action in a state court constitutes prohibited state action.

The contention that an action for damages against an original covenantor is to be distinguished from a suit in equity because in the former the defendant, by his covenant, consents to suit whereas in the latter he does not consent, is ingenious but faulty. An individual cannot consent to state court action the purpose and effect of which is to aid in discrimination based solely on race, to entrench segregation and thus deny to a class of citizens the equal protection of the laws. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect; it will not promote in one form that which it declares wrong in another. The argument loses sight of [fol. 293] the fact that Shelley holds that if such covenants of private individuals require recourse to the courts to make them effective, the Fourteenth Amendment precludes such aid.

The denial of access to the courts does not deprive plaintiffs of their property without due process of law. The Constitution itself deprives them of the use of the courts when their purpose is the enforcement of their discriminatory covenant. "The Constitution confers upon no individual the right to demand action by the State which results in the

[37] See Kemp v. Rubin, 298 N. Y. 590 [81 N. E. 2d 325]; Buchanan v. Warley, 245 U. S. 60 [38 S. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C 210, Ann. Cas. 1918A 1201].

denial of equal protection of the laws to other individuals."[38]

In the light of the Restrictive Covenant Cases it is the duty of the courts of this state to refrain from exerting judicial power to give legal sanction and effect to racial restrictive covenants in an action at law for damages. The demurrer was properly sustained.

Affirmed.

Shinn, P. J., and Wood (Parker), concurred.

[fols. 293½-299] APPENDIX "B"

Amendment to Rules of the Federal Housing Commissioner for Mutual Mortgage Insurance Under Section 203 of the National Housing Act

Section III of the Administrative Rules under Section 203 of the National Housing Act, revised August 15, 1946, as amended, is hereby amended by adding at the end thereof the following new subsection:

> "15. The mortgage shall contain a covenant by the mortgagor that until the mortgage has been paid in full, or the contract of insurance otherwise terminated, he will not execute or file for record any instrument which imposes a restriction upon the sale or occupancy of the mortgaged property on the basis of race, color, or creed. Such covenant shall be binding upon the mortgagor and his assigns and shall provide that upon violation thereof the mortgagee may, at its option, declare the unpaid balance of the mortgage immediately due and payable."

Section IV of said Administrative Rules is hereby amended by adding at the end thereof the following new subsection:

> "5. A mortgagor must certify that until the mortgage has been paid in full, or the contract of insurance

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[38] Shelley v. Kraemer, 334 U. S. 1, 22 [68 S. Ct. 836, 92 L. Ed. 1161, 3 A. L. R. 2d 441].

otherwise terminated, he will not file for record any restriction upon the sale or occupancy of the mortgaged property on the basis of race, color, or creed or execute any agreement, lease, or conveyance affecting the mortgaged property which imposes any such restriction upon its sale or occupancy."

Section V of said Administrative Rules is hereby amended y adding at the end thereof the following new subsection:

"5. A mortgagee must establish that no restriction upon the sale or occupancy of the mortgaged property, on the basis of race, color, or creed, has been filed of record at any time subsequent to February 15, 1950, and prior to the recording of the mortgage offered for insurance."

This amendment is effective as to all mortgages on which a commitment to insure is issued on or after February 15, 1950.

Issued at Washington, D. C., this 12th day of December, 1949.

Franklin D. Richards, Federal Housing Commissioner.

[fol. 300] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 301] Order Due Oct. 4, 1952.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

BARROWS et al.,

v.

JACKSON

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

Appellants' petition for hearing Denied.

Shenk, J., Edmonds, J. and Schauer, J. are of the opinion that the petition should be granted.

Gibson, Chief Judge.

Filed Oct. 2, 1952. William I. Sullivan, Clerk, by ——, L. A. Deputy.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 6th day of October, A. D. 1952.

William I. Sullivan, by Henry P. Crabtree, Deputy Clerk.

[fol. 302] IN THE SUPREME COURT OF THE UNITED STATES

No. —

[Title omitted]

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

For the purpose of the petition for writ of certiorari and, in the event the petition be granted, for the purpose of

hearing and determining the case on the merits, the printed record shall consist of the following:

Second Amended Complaint	Pages	1 thru 9
Demurrer		11 thru 12
Memorandum Opinion		14 thru 25
Judgment		29
Petition for Rehearing		244 thru 246
Petition for Hearing Including Appendix A (Opinion of District Court of Appeal)		247 thru 293
Order of California Supreme Court denying hearing after judgment by District Court of Appeal		301

It is further Stipulated and Agreed that any of the par-
[fol. 303] ties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

John C. Miles, J. Wallace McKnight and Charles Leland Bagley, by Charles Leland Bagley, Counsel for Petitioner. Sims & Wallbert & Loren Miller, by Maurice H. Wallbert, Counsel for Respondent.

[fol. 304] Supreme Court of the United States, October Term, 1952.

No. 517

Olive B. Barrows, Richard Pikaar and M. M. O'Gara, Petitioners,

vs.

Leola Jackson

Order Allowing Certiorari—Filed March 9, 1953

The petition herein for a writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.